NO. 91-2051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

In this brief, the State of South Dakota replies to the argument of the Tribe set out in its "Opposition to Petition for Writ of Certiorari" (Op. Pet.). The most serious generic problem with the position with the

presentation of the Tribe is that it has failed to clearly identify the source of its alleged power over non-Indians on lands taken in fee by the United States for the construction of the Oahe Reservoir, the land at issue here. Second, the Tribe has, unfortunately, seriously distorted the record in several respects.

A. The Tribe Does Not Have the Power to Regulate Non-Indians on the Federal Fee Lands and Overlying Waters at Issue Pursuant to Treaty or as a Component of its Inherent Sovereignty.

At the heart of the legal issue in this case is the source of the alleged authority of the Tribe to regulate non-Indians on 100,000 acres of land taken in fee from the Tribe and its members by the United States under the Cheyenne River Act of 1954, Pub.L. 83-776, 68 Stat. 1191 (1954), for

construction and operation of the vast Oahe Reservoir.[1]

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[1]Also at issue are 18,000 acres of land presumed to be fee land originally conveyed to non-Indians under the General Allotment Act and then acquired from the non-Indians under the authority of the Flood Control Act of 1944, Pub.L. 78-534, 58 Stat. 887. The Court of Appeals remanded the issue of whether the Tribe had authority over these lands for an analysis in terms of Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) and Montana v. United States, 450 U.S. 544 (1981). The direction of the Court of Appeals was incorrect, however, because it is clear from the opinion of Justice White in Brendale that the proof of the existence of the second of the two Montana exceptions, i.e., that relating to the impact of nonmember activity on the political integrity, economic security or health and welfare of the Tribe would give rise to federal court, not tribal court jurisdiction. 492 U.S. at 431. Furthermore, the direction of the Eighth Circuit is incorrect in that it indicates that if the lands were not taken under an "allotment act" the Montana exception may not apply and the analysis "may be" (not "may well be," see State's Pet. at 37) different. Montana-Brendale apply to all lands alienated by Indian tribes in the absence of a specific congressional delegation of power to the Tribes, as set out in the main argument of the State. As with most of the other points in this case, the Tribe has failed to respond to these arguments. See Op. Pet. at 21-22.

Two potential sources of power to regulate non-Indians have been discerned--a tribal power to exclude drawn from treaty and the inherent power of the Tribe. See Montana v. United States, 450 U.S. 544 (1981). As noted above, the Tribe has failed to inform the Court of its opinion regarding the source of its powers over non-Indians and has thus confounded the legal and factual issues. The Court of Appeals did make the critical distinction and found the source of tribal power to regulate non-Indians on the federal fee lands to be derived from the tribal exclusivity provisions of the Ft. Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869). See Cir. Crt. Op. A-24.[2]

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[2]It is, however, quite doubtful that the mere power to exclude non-Indians found by implication in the Ft. Laramie Treaty includes a general regulatory power over non-Indian persons without their consent, as the six Amici States demonstrate. See Brief of Amici Curiae States of Montana, Alabama, (continued...)

Assuming that the tribal exclusivity provision did carry the right to regulate non-Indians, it follows nonetheless that when the right to exclude is lost any "lesser included power" to regulate is lost. Since it is clear under the Flood Control Act of 1944, Pub.L. 534, 58 Stat. 889 (1944), 16 U.S.C. § 460d, and the 1954 Taking Act, 68 Stat. 1193 at § 10 that the Tribe does not retain a right to exclude non-Indians from this public land, it follows that this "power can no longer serve as the basis for tribal exercise of the lesser included power[.]" Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 424 (1989) (White, J.).[3]

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[2](...continued)
California, North Dakota, Utah, and Washington in Support of Petition for Writ of Certiorari at 5-7.

[3]Indeed, the circuit court opinion at A-42 states that the Tribe is not "free
(continued...)

The reliance of the Circuit Court, see Cir. Crt. Op. A-40 and 41 on United States v. Dion, 476 U.S. 734 (1986); Washington v. Washington State Commercial Passage of Fishing Vessel Assoc., 443 U.S. 658 (1979), modified on other grounds, 444 U.S. 816 (1979) and Menominee Tribe v. United States, 391 U.S. 404 (1968) to bolster its treaty power argument is simply misplaced. None of these cases considers whether a non-Indian would be subject to tribal jurisdiction.[4]

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[3](...continued)
entirely to exclude non-Indians" from taken area even under its incorrect decision.

[4]The Circuit Court's reliance on New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) is even more troublesome given this Court's statement in Mescalero that:

> Unlike this case, Montana concerned lands located within the reservation but not owned by the tribe or its members.

462 U.S. at 323-324. See Cir. Crt. Op. at 841 n.18.

Nor do Montana-Brendale suggest that a Dion-style analysis must be performed to determine whether tribal jurisdiction exists over non-Indians on non-Allotment Act lands alienated from tribal members. As Brendale states, the Montana court

> flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which the tribes can no longer exclude nonmembers.

Brendale, 492 U.S. at 424 (White, J.). (quoting Montana v. United States, 450 U.S. at 559). There is simply no room for a Dion analysis under the Montana-Brendale rule.

A second potential source of tribal power over non-Indians is the inherent power of the Tribe. The Tribe's repeated citation of Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) suggests that this may be the source relied upon by the Tribe. Merrion, however, concerned the exercise of the Tribe's inherent power on trust lands and is

thus not on point. See 455 U.S. at 133. Furthermore, as stated in Brendale, the

> regulation of "relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with the tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested.

Brendale, 492 U.S. at 427 (quoting United States v. Wheeler, 435 U.S. at 326). Because the matter here is entirely one of the external relations of the Tribe, tribal sovereignty has been divested.

Moreover, to the extent that the Tribe relies on the inherent sovereignty "second exception" in Montana, 450 U.S. at 566, to allege that it retains inherent authority because of the nature of activities of the non-Indians in the taken area, it is dispositive that the District Court found that the Tribe

> need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its

> political integrity, economic security or health or welfare.

Dist. Crt. Op. A-85.[5]

This general finding was not rejected by the Court of Appeals and notwithstanding the tribal implications to the contrary, is amply supported by the record. The Tribe contends that non-Indians on the take area have interfered with tribal cattle. Op. Pet. at 7. It then asserts, without citation, that such activities were "pervasive." Op. Pet. at 7 n.2. The District Court, however, found that "[g]enerally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and the protection of other

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[5]In any event, as the plurality opinion in Brendale makes clear, the existence of the Montana "second exception" factors gives rise only to federal, not tribal court jurisdiction. See Brendale, 492 U.S. at 430-431 (White, J.).

property." Dist. Crt. Op. A-78. Moreover, trial testimony showed that no complaints about nonmembers causing trouble or damage to cattle grazing on Corps of Engineers lands had ever been received by any federal, state or tribal officer in his official capacity. TR 499; TR 599-600; TR 927-928; PH 133; TR 612-613.

Second, the Tribe appears to assert that its lands alone contribute to the well-being of deer herds on the taking area. However, the same finding by the District Court as quoted by the Tribe also states:

> As a white-tail deer may move up to twelve miles across its home range, all reservation lands, whether trust, deeded or public, sustain deer populations.

Dist. Crt. Op. A-77, A-78. Moreover, the Tribe cites no evidence in support of its bald assertion that there may not be any deer on the reservation without early tribal regulations. In fact, the District Court

found that although the Tribe had engaged in certain efforts in the 1930s and 1940s that until 1989 the Tribe had no ongoing wildlife surveys and had "no established conservation, depredation, or stocking program to protect and enhance" wildlife resources. Dist. Crt. Op. A-81.

The Tribe finally implies that it somehow is responsible for the fish population in the Oahe Reservoir. Op. Pet. at 7-8. At the time of trial, however, the Tribe had in place no "conservation, depredation or stocking programs. . ." to enhance fishery resources, Dist. Crt. Op. A-81, did no management at all on the Oahe Reservoir, TR 521, had only one boat which it had taken on the Missouri River "once" as a "demonstration," TR 506-507, and apparently had no plans to engage in fishery management on the Oahe Reservoir. See TR 839-840. In contrast, the State had engaged in the

stocking of 72 million fish in the Oahe Reservoir including rainbow trout, small-mouth bass, walleye, and chinook salmon in the period 1970-88, and had conducted myriad fish population and similar studies. Dist. Crt. Op. A-85, 86. The State also furthered fish management through "[e]nforcement of fishing regulations." Dist. Crt. Op. A-86. The Tribe ignores the fact that closely attentive management is necessary to deal with the progressive sedimentation or siltation of reservoirs, including the lower portions of the Oahe Reservoir adjacent to the Cheyenne Reservation, TR 26-29, 41-44, 78. See, e.g., Exhibit 173 (study of stocking of walleye fingerlings at various points on the reservoir, including points immediately adjacent to the Cheyenne River Reservation, id., Table 1).

The Tribe also appears to indicate that its interest would suffer because it has in

the past regularly enforced the provisions of its game and fish laws on non-Indians within the taken area. The admissions of the tribal Defendants, however, are to the contrary.

In particular, Tribal President Wayne Ducheneaux admitted at trial that prior to the pendency of this litigation, there had never been a single civil or criminal action brought by the Tribe against a nonmember or non-Indian in tribal court on a hunting and fishing violation occurring in any place within the taken area. TR 548-549. See also Testimony of Lenita Miner, Director of the Tribal Game, Fish and Parks at TR 517-518.[6]

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[6]Indeed, the two statements indicate that the Tribe had not brought such actions against any non-Indian for any violation of hunting and fishing ordinances at any place on the reservation. It is of some interest to note that, in 1983, the Tribe in its public statement indicated that its licenses were valid "only on tribal land." Exhibit 214, JA 405. It was only in 1985, Exhibit 258, JA 423, in a decision implemented in 1988, see TR 527, that the

(continued...)

Further, in 1987, in the single instance in which the Tribe apprehended a non-Indian on Corps land prior to this litigation, the United States Fish and Wildlife Agent advised the tribal officers that they should release the non-Indian (which the tribal officers did do). Exhibit 257; TR 561-562.[7] The

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[6](...continued)
Tribe began to consider abandoning it former stance of acquiescence of state jurisdiction and "go for total jurisdiction," see JA 405, including jurisdiction over non-Indians on fee lands including the public lands and waters.

[7]The Tribe at Op. Pet. 18-19 relies heavily upon a 1954 statement of the tribal attorney that "white citizens" needed a license from the tribal council to hunt and fish on the reservation; the Tribe unaccountably fails to note the District Court's analysis that "read in context" the tribal lawyer was referring to the situation at the time of the 1954 taking and "was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were actually taken." Dist. Crt. Op. A-137-38. Indeed, the tribal lawyer specifically referred to the post-taking situation as one in which tribal members would have a "right of free access, including the right to hunt and fish on the shoreline,
(continued...)

District Court's findings with regard to this matter, see A-72, 73, should be read in light of the tribal concessions as set forth above.

B. Montana-Brendale May Not Be Distinguished Merely Because the Tribe was Granted or Retained Certain Interests in Lands to Which the United States Took Fee Title.

The Tribe contends that because Congress granted or retained in the Tribe certain interests in the Corps fee lands that Montana-Brendale are not applicable to this

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[7](...continued)
subject, however, to regulations governing the corresponding use by other citizens of the United States." Acquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, South Dakota, and For Other Purposes: Hearings on H.R. 2233 and S. 655 Before the Comm. on Interior and Insular Affairs Joint Senate and House Sub. Comm. on Indian Affairs, 83d Cong., 2d Sess. 289 (1954). The tribal lawyer certainly knew that a mere right of access did not contain a right to regulate others. See generally, New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916). Finally, it is noted that there certainly is no evidence in the record of actual tribal regulation of non-Indians on nontrust land at this time.

case.[8] See Op. Pet. at i, 6, 14. The Tribe first points to a reservation of mineral rights in the take area but this reservation, which is "subject to all reasonable regulations which may be imposed by the chief of engineers," is simply irrelevant to hunting and fishing within the take area.

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[8]Op. Pet. at 13 n.5, asserts that the State for the first time asserts that "Montana" finds that the Tribe's power to regulate stems "only" from its power to exclude. The State's Petition examines and rejects two potential sources of tribal regulatory power (i.e., treaty exclusion and inherent sovereignty). In addition, the State has effectively asserted that any power to regulate arising from a treaty right to exclude was lost when the right to exclude was lost through the 1954 Taking Act; the apparent tribal assertion that the State has cited only Brendale rather than Montana in each of its previous treaty based arguments is irrelevant and without merit. See, e.g., State's Trial Brief at 64-70 (citing Brendale quoting Montana); Appellee-Cross-Appellant's Brief at 36-39 (citing Brendale quoting Montana); id. at 47 n.13 (urging adoption of the rationale of the District Court which included a Montana analysis based on exclusionary authority, see, Dist. Crt. Op. 128-129, 134); Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc at 8-9 (citing Montana).

The Tribe also contends that it has a "right to all timber in the area," Op. Pet. at 14, but neglects to add that this right expired long ago pursuant to § 9 of the 1954 Act. See App A-202; 203-204. The Tribe finally contends that § 10 provides for a tribal right to use the taken area for grazing as well as hunting and fishing. Op. Pet. at 14. This section provides, however, that the Tribe and its members would have only,

> without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish on the aforesaid shoreline reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

A-205. When Congress provided that the Tribe would have merely a right of "access" for hunting and fishing "subject to" regulations which govern "other citizens," it made clear

its intention that the Tribe not itself regulate others on those lands and waters.[9]

C. The Position of the United States Adds Nothing to the Analysis.

The Tribe implies to this Court that the current support by the United States of its position is deserving of note. Op. Pet. at 3, 8. The opposite is true.

The Corps of Engineers, the agency with primary responsibility for the "take area," has consistently told the public in writing that hunting and fishing are allowed on the Oahe project area "in accordance with the rules and regulations established by . . . the South Dakota Game, Fish and Parks Department and the United States Fish and Wildlife Service." Corps of Engineers Recreational Boating Guide Map, P.H.Ex. 33. Similarly, a COE attorney told Congress as

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[9]The Circuit Court hinted at but did not itself rely upon any "retained rights" analysis. See Cir. Crt. Op. A-36, 37.

recently as 1987 that "Senator, it is my understanding that . . . we would rely on the state agencies for enforcement of [game and fish] laws in those areas [the take areas]." Senate Hearing 100-500 (1987) at 12, JA 925.[10]

The abrupt and unexplained change of position of the United States endorsing tribal jurisdiction does not add to the analysis of this issue.

CONCLUSION

This case presents to the Court an opportunity to clarify the standards for determining the parameters of treaty-based and inherent tribal authority over non-Indians especially on governmentally owned property on reservations. Thus the Court's

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[10]The discussion concerned two other reservations which are adjacent to the Missouri River mainstem but the statement clearly has application to the Cheyenne River Reservation take area in the State's view.

decision will have direct impact up and down the Missouri River, which may be "Balkanized" by the decision of the Eighth Circuit and will also impact other federal lands and private lands. Finally, this Court's resolution of the controversy may well lead to the return to a more harmonious situation between Indians and non-Indians in the western states. The State respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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